Nos. 75–909, 75–960, 75–1050, and 75–1055

In the Supreme Court of the United States

OCTOBER TERM, 1976

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER
v.
EDMUND G. BROWN, JR., GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER
v.
STATE OF MARYLAND, ET AL.

COMMONWEALTH OF VIRGINIA, EX REL.
STATE AIR POLLUTION CONTROL BOARD, PETITIONER
v.
RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

RUSSELL E. TRAIN, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER
v.
DISTRICT OF COLUMBIA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH, FOURTH AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE FEDERAL PARTIES

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

G. WILLIAM FRICK,
General Counsel,

A. RAYMOND RANDOLPH, Jr.
Deputy Solicitor General,

JOHN E. BONINE,
Associate General Counsel,

HARRIET S. SHAPIRO,
Assistant to the Solicitor General,

GERALD K. GLEASON,
Deputy Associate General Counsel,
Environmental Protection Agency,
Washington, D.C. 20460.

EDMUND B. CLARK,
BRUCE J. CHASAN,
NEIL T. PROTO,
MICHAEL D. GRAVES,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH, FOURTH, AND DISTRICT OF COLUMBIA CIRCUITS

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit in *Brown* v. *Environmental Protection Agency* (Pet. No. 75–909, App. A) and *State of Arizona* v. *Environmental Protection Agency* (Pet. No. 75–909, App. C) are reported at 521 F. 2d 827 and 521 F. 2d 825, respectively. The opinion of the United States Court of Appeals for the Fourth Circuit in *State of Maryland* v. *Environmental Protection Agency* (Pet. No. 75–960, App. A) is reported at 530 F. 2d 215. The opinion of the United States Court of Appeals for the District of Columbia Circuit in *District of Columbia* v. *Train* (Pet. No. 75–1055, App. A; Pet. No. 75–1050, App. A) is reported at 521 F. 2d 971.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit in *Brown* v. *Environmental Protection Agency* was entered on August 15, 1975 (Pet. No. 75–909, App. A). By order of November 3, 1975, Mr. Justice Douglas extended the time within which to file a petition for a writ of certiorari to and including December 18, 1975. By order of December 8, 1975, Mr. Justice Rehnquist further extended the time within which to file a petition for a writ of certiorari to and including December 24, 1975. The judgment of the Court of Appeals for the Ninth Circuit in *State of Arizona* v. *Environmental Protection Agency* (Pet. No. 75–909, App. C) was entered on September 8, 1975. By order of December 1, 1975, Mr. Justice Rehnquist extended the time within

which to file a petition for a writ of certiorari to and including December 18, 1975, and by order of December 8, 1975, he extended the time within which to file a petition for a writ of certiorari to and including December 24, 1975. The petitions of both parties were filed on December 24, 1975 and were granted on June 1, 1976 (A. 978).

The judgment of the Court of Appeals for the Fourth Circuit in *State of Maryland* v. *Environmental Protection Agency* was entered on September 19, 1976 (Pet. No. 75–960, App. A). By order of December 11, 1975, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 12, 1976. The petition was filed on January 7, 1976 and was granted on June 1, 1976 (A. 979).

The judgment of the Court of Appeals for the District of Columbia Circuit in *District of Columbia* v. *Train* was entered on October 28, 1975 (Pet. No. 75–1055, App. A). The petitions for writs of certiorari were filed on January 26, 1976 and granted on June 1, 1976 (A. 980–981).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions are set forth in Appendix A, *infra*.

QUESTIONS PRESENTED

1. Whether the Administrator of the Environmental Protection Agency has authority under the Clean Air Act to require a State to manage its transportation system so as to decrease air pollution resulting from motor vehicle traffic.

2. Whether, if the Administrator has such statutory authority, the Clean Air Act is in this respect a valid exercise of Congress' power under the Commerce Clause of the Constitution.

3. Whether the requirement that the Commonwealth of Virginia contribute to the purchase of buses is consistent with the Washington Metropolitan Area Transit Authority Compact.

STATEMENT

A. STATUTORY BACKGROUND

As amended in 1970, the Clean Air Act prescribes a comprehensive regulatory scheme for reducing emissions of certain pollutants into the ambient air in order "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" (Section 101(b)(1)).[1] In concluding that it was necessary to attain this objective, Congress found that (Section 101(a)(2)):

> [T]he growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation.

[1] Section references to the Act are used in the text; cross references to the United States Code citations appear in the Appendix.

The Administrator of the Environmental Protection Agency (EPA) must establish standards governing maximum concentrations of particular pollutants in the air, but the Act gives States and local governments the primary responsibility for promulgating enforceable regulations to establish and implement air quality control programs (Sections 101(a)(3), 107(a)). The Act requires each State to submit to the Administrator a plan for "implementation, maintenance, and enforcement" of the national primary and secondary ambient air quality standards[2] for every portion of the State within nine months after the Administrator promulgates those standards. Section 110(a)(1). Within four months after its submission, the Administrator must approve the State's implementation plan if it satisfies the statutory criteria; if it does not, he must promulgate a substitute plan for the State (Section 110 (a)(2) and (c)).

The implementation plan must provide a regulatory

[2] National primary ambient air quality standards are "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator * * * are requisite to protect the public health." Section 109(b)(1). A national secondary ambient air quality standard is "a level of air quality the attainment and maintenance of which in the judgment of the Administrator * * * is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [each] air pollutant [for which criteria have been established] in the ambient air." Section 109(b)(2). The "public welfare" includes "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." Section 302 (h).

scheme for controlling emissions from stationary and moving sources of pollution to the extent necessary to attain the national standards within each of the State's air quality control regions (Section 110). The procedures necessary to achieve and maintain the standards will vary with the conditions in the different air quality control regions; more stringent measures are necessary in severely polluted urban areas.[3] The Act requires each state implementation plan to provide for the attainment of the primary air quality standards throughout the State within three years from the date the Administrator approves the plan, and the secondary standards within a reasonable time (Section 110(a)(2)(A)). In order to do so, each plan must include, for each air quality control region: (1) regulations limiting emissions from old and new pollution sources; (2) schedules for compliance with the limitations; (3) provisions for collecting, analyzing and making available emissions data; (4) provisions for such additional methods of pollution control as may be necessary, including land-use and transportation controls; (5) a description of the State's legal authority and resources to implement its plan; (6) a procedure for revision of its plan; (7) provisions for intergovernmental cooperation; and (8) to the extent necessary and practicable, a procedure for inspecting and testing motor vehicles.

[3] The dispute here involves the plans for several such regions: the National Capital Area (Washington, D.C., and its Maryland and Virginia suburbs); Metropolitan Baltimore; Metropolitan Los Angeles; San Diego; the San Francisco Bay Area; Sacramento; and the San Joaquin Valley.

B. FACTUAL BACKGROUND

On April 30, 1971, the Administrator, acting pursuant to Section 109 of the Act, promulgated national primary and secondary air quality standards for six pollutants. 36 Fed. Reg. 8186 (April 30, 1971). Four of these pollutants—carbon monoxide, photochemical oxidants, nitrogen dioxide and hydrocarbons—result chiefly from motor vehicle emissions, which constitute forty-eight percent of the total of approximately 190 million tons of air pollutants produced in this country annually.[4] The statute accordingly required that each State submit its implementation plan for these six pollutants to the Administrator for approval within 9 months—no later than January 30, 1972—and he was to act on all plans by May 31, 1972 (Section 110(a)).

As noted, Section 110 of the Act requires that transportation controls be part of a state implementation plan when they are necessary to attain or maintain the primary air quality standards.[5] The Administra-

[4] Motor vehicles emit carbon monoxide (CO) directly into the air. Emitted hydrocarbons, however, combine with oxides of nitrogen (NOx) in the presence of sunlight to produce the secondary pollutant, photochemical oxidants (smog). See Department of Health, Education, and Welfare, Nos. AP-63 and AP-64, *Air Quality Criteria for Photochemical Oxidants* and *Air Quality Criteria for Hydrocarbons* (March, 1970); S. Rep. No. 91-1196, 91st Cong., 2d Sess. 25-28 (1970); H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 6, 11-13 (1970); Committee Print, Serial No. 93-18, A Legislative History of the Clean Air Amendments of 1970, 93d Cong., 2d Sess. (1974) ("Leg. Hist."), pp. 381-382 (S. Debate on S. 4358, Sept. 22, 1970, Sen. Montoya); Leg. Hist. 228 (S. Debate on S. 4358, Sept. 21, 1970, Sen. Muskie).

[5] Transportation controls include "any measure, such as reducing vehicle use, changing traffic flow patterns, decreasing

tor initially decided to permit the States extra time to submit transportation control plans due to the lack of experience with such controls and the scarcity of available data. Thus, while the state implementation plans were due on January 30, 1972, he deferred the date for state submission of any necessary transportation control plans until February 15, 1973. 36 Fed. Reg. 15486 (August 14, 1971). He also extended for two years the date for attainment of the primary air quality standards in areas where transportation control measures were necessary. See generally 38 Fed. Reg. 30626 (November 6, 1973); 37 Fed. Reg. 10842 (May 31, 1972).

The deferrals and extensions were challenged in the United States Court of Appeals for the District of Columbia Circuit (see Section 307(b)(1)); on January 31, 1973, that court declared the Administrator's actions invalid. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 475 F. 2d 968. The effect of the delays, the court concluded, was "to interfere with the Congressional purpose of attaining clean air by a date certain, May 31, 1975, subject only to certain limited and well defined statutory extensions" (475 F. 2d at 970). The court ordered the Administrator to rescind all previously granted deferrals for the submission of transportation control plans as well as the two-year extensions for attainment

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emissions from individual motor vehicles, or altering existing modal split patterns [patterns of use of various transportation methods] that is directed toward reducing emissions of air pollutants from transportation sources." 40 C.F.R. 51.1(r). See S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2, 12-14 (1970).

of air quality, and ordered him to require each State to submit by April 15, 1973, an appropriate plan to attain the primary air quality standards by May 31, 1975. If a State failed to submit such a plan, the Administrator would have to prepare and publish a substitute plan (475 F.2d at 970–971; Section 110(c)).

The Administrator promptly notified the twenty-two affected States of these developments and amended his previous actions on state plans to comply with the court order. 38 Fed. Reg. 7323 (March 20, 1973). The State of California failed to submit a transportation control plan to EPA by April 15, 1973. Accordingly, the Administrator disapproved the California plan for oxidants and carbon monoxide in five regions, 38 Fed. Reg. 16550, 16556, 16564 (June 22, 1973).[6] The other States who are respondents have submitted transportation control plans to the Administrator. However, these plans were in some respects inadequate to insure attainment and maintenance of the primary air quality standards by May 31, 1975, and therefore the plans were disapproved in part. 38 Fed. Reg. 16550, 16555–16569 (June 22, 1973) (Arizona, Maryland, and Virginia). Each of the States subsequently supplemented its plan to correct some of the deficiencies identified by the Administrator. To the extent possible, the Administrator approved the plans as supplemented. To the extent they were still inadequate, he promulgated substitute measures, supple-

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[6] He had previously disapproved a plan for Los Angeles, 37 Fed. Reg. 10842, 10852 (May 31, 1972).

menting or modifying the state proposals only as necessary to assure attainment of the required air quality.[7]

The substitute measures for Arizona were promulgated on December 3, 1973 (38 Fed. Reg. 33368), for California on November 12, 1973 (38 Fed. Reg. 31232),[8] for the Baltimore Air Quality Control Region of Maryland on December 12, 1973 (38 Fed. Reg. 34240), and for the National Capital Interstate Air Quality Control Region (consisting of Washington,

[7] *E.g.*, 38 Fed. Reg. 30628 (November 6, 1973); 38 Fed. Reg. 33702 (December 6, 1973). In the National Capital Area, for example, the District of Columbia and Virginia proposals for inspection and maintenance of light-duty vehicles were adequate and were approved in full; the substitute plans for the District and Virginia contain only requirements for inspection and maintenance of medium and heavy duty vehicles. 38 Fed. Reg. 33705 (December 6, 1973); Pet. No. 75-1055, App. 62a-65a, 106a-109a. Although Maryland also proposed an inspection and maintenance program for light-duty vehicles, it was not described in detail and the substitute plan for Maryland was designed to establish a program similar to those of the other jurisdictions. 38 Fed. Reg. 33705 (December 6, 1973). The three jurisdictions also proposed to establish exclusive bus lanes in specified highway corridors and to expand bus service in the National Capital Area by adding 750 buses to the existing fleet. The Administrator approved these proposals except to the extent that they failed to assure that the measures would actually be implemented in a timely manner; to remedy that deficiency, he promulgated supplementary requirements to assure that the necessary actions would be taken on schedule. 38 Fed. Reg. 33705-33706 (December 6, 1973; Pet. No. 75-1055, App. 104a-105a.

[8] Before the substitute plan was promulgated, the legislature of California authorized the Governor to implement a mandatory program of automobile emission control inspection in the Los Angeles air quality control region, and later to expand the program to other parts of the State. Ann. Cal. Code, Bus. & Prof., Section 9889.50, *et seq.* (1973).

D.C., and its Virginia and Maryland suburbs) on November 15, 1973 (38 Fed. Reg. 31536), and on December 6, 1973 (38 Fed. Reg. 33702).

Although the provisions vary somewhat from State to State, the regulation for inspection and maintenance of automobiles in Baltimore illustrates the type of requirements imposed by the Administrator.[9] The regulation, 40 C.F.R. 52.1095: (1) requires the State of Maryland to establish an inspection and maintenance program applicable to vehicles registered in Baltimore which operate on public streets or highways over which it has ownership or control (40 C.F.R. 52.1095(c)); (2) requires the State to submit by February 1, 1974, "a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program," including the text of "needed statutory proposals" and "regulations that it will propose for adoption," the date by which the State will recommend needed legislation to the State legislature, the date by which equipment will be ordered, and a statement by the Governor or his designee identifying the sources and amounts of funds for the program, plus the text of needed legislation, if any (40 C.F.R. 52.1095(f)); (3) requires the State by April 1, 1974,

[9] In addition to the inspection and maintenance programs, the various substitute plans required the States to take such actions as establishing bicycle and bus lanes, submitting compliance schedules for implementing the commitments in their plans to purchase buses, requiring older cars to be fitted with emission control devices, limiting parking on public streets, and establishing computerized carpool information services. The nature of these requirements is described in 38 Fed. Reg. 30628-30631 (November 6, 1973).

to submit legally adopted regulations establishing the program, including provisions for yearly inspection, emission standards, maintenance of failed vehicles, anti-tampering measures, designation of a responsible state agency, and completion of the first inspection cycle by July 31, 1976 (40 C.F.R. 52.1095(c)); (4) prohibits the State after July 31, 1976, from registering or allowing to operate on its public streets or highways any noncomplying vehicles (40 C.F.R. 52.1095 (d)); and (5) prohibits owners from operating noncomplying vehicles after July 31, 1976 (40 C.F.R. 52.1095(e)).

In explaining these requirements, the Administrator noted that extensive state highway systems encourage the use of private cars, the major sources of four of the six pollutants to be controlled. He therefore concluded that highways are indirect sources of pollutants, and the State, as owner and operator of the sources, can be directed, like any other operator of a pollution source, to conduct its pollution causing activities in a way that will minimize the pollution released (38 Fed. Reg. 30632–30633, November 6, 1973). Thus, the Administrator's regulations directed each jurisdiction here involved to submit schedules showing when it would establish programs—including inspection and maintenance programs and bus lane programs—to bring its operation of the highways in the various air quality control regions involved into compliance with the applicable implementation plan (40 C.F.R. 52.242, 52.244, 52.490, 52.1089, 52.2441, 52.2442, 52.137–52.139, 52.1095(f)). California, Arizona, Maryland, the District of Columbia and Virginia thereupon petitioned the courts of appeals pursuant to Section 307 (b)(1) of the Act for review of the Administrator's regulations.

C. THE PROCEEDINGS BELOW

1. *Edmund G. Brown, Jr., et al.* v. *Environmental Protection Agency* (Pet. No. 75–909, App. 1a). After preliminary proceedings, the court and the parties determined that the question of the scope of EPA's authority to require compliance by the State was ripe for immediate adjudication. Other constitutional and statutory questions were to be heard at a later date.

Refusing to accept the Administrator's rationale for treating the State, in its role of owner and operator of its highways, as a creator of the pollution (*id.* at 26a), the court concluded that "the Act, as we see it, permits sanctions against a state that pollutes the air, but not against a state that chooses not to govern polluters as the Administrator directs" (*id.* at 11a). The court concluded that neither Section 113(a)(2), which provides for federal enforcement of an implementation plan when the State fails to do so, nor any other part of the Act explicitly permits the Administrator "to compel the states to administer and enforce regulations promulgated by him designed to govern polluters, potential or actual, other than the state * * *" (*id.* at 18a). The court declined to infer the presence of any such power, because "Congress would not have intended to take such a step in the light of the delicacy with which federal-state relations always have been treated by all branches of the Federal Government in this obscure manner" (*id.* at 16a). The court did recognize, however, that "our reading of section 113 and our percep-

tion of the structure of the Act is not unambiguously supported by the applicable legislative history" (*id.* at 19a).

Although resting its decision on statutory interpretation, the court discussed the constitutional issues that would be raised if the statute authorized the Administrator to require the States to regulate private pollution causing activities. Economic activity by the States that substantially affects interstate commerce is subject to federal regulation under the Commerce Clause, but no case, according to the court of appeals, "holds or even suggests that a State's exercise of its police power with respect to an economic activity which affects interstate commerce is itself an economic activity or 'species of commercial intercourse' subject to regulation by Congress" (*id.* at 27a). The court concluded that the federal government cannot compel a State to regulate air pollution unless the pollution is solely caused by a source or activity owned or operated by the State (*id.* at 10a–11a). Otherwise, the court suggested, States might be deprived of control over the manner in which their tax revenues are spent and might become simply tools for effectuating federally-prescribed policies (*id.* at 32a–37a).

2. *State of Arizona* v. *Environmental Protection Agency* (Pet. No. 75–909, App. 40a). Relying on its decision in *Brown* v. *Environmental Protection Agency*, *supra*, the court of appeals held that "the Clean Air Act does not authorize the imposition of sanctions against the State of Arizona or its officials for failure to comply with" the EPA amendments to the state implementation plan (*id.* at 43a).

3. *State of Maryland, et al.* v. *Environmental Protection Agency* (Pet. No. 75–960, App. 1a). The court of appeals focused upon the provisions in the Administrator's substitute transportation control plan requiring the State to submit "legally adopted regulations" and the "text of needed legislation," and concluded that "EPA has directed Maryland and her legislature to legislate under pain of civil and criminal penalties * * *" (*id.* at 22a).[10] In order to avoid the serious constitutional issues raised by this direction, the court decided the case on statutory grounds (*id.* at 27a–28a). The court held that the Administrator exceeded his authority in promulgating the contested regulations, because Section 110(c) authorizes the Administrator merely to prepare "regulations to be applied [by EPA] within the boundaries of a state if it does not act in a manner approved by the EPA" (*id.* at 29a, 31a, 32a).

4. *District of Columbia, et al.* v. *Train* (Pet. No. 75–1055, App. 1a). As did the court in the *Maryland* case, the United States Court of Appeals for the District of Columbia Circuit held that the Clean Air Act did not authorize the Administrator to require the States to adopt legislation or regulations to establish a transportation control program found necessary by EPA. Thus, if a State fails to submit an acceptable plan, the Administrator must promulgate the regulations to be applied within the State; he cannot compel the State to do so (*id.* at 20a–28a). But the court of appeals further held

[10] Section 113(c) provides for criminal penalties under certain circumstances. The Administrator has consistently denied any intention to seek these sanctions against a State. See *infra*, n. 32.

that when such regulations have been promulgated, the Act authorizes the Administrator to require the States to administer them. The court then considered the constitutionality of the Act as so interpreted, and concluded that a State could be required to implement federal regulations designed to control pollution the State caused directly (*e.g.*, through operation of state-owned vehicles) or indirectly (*e.g.*, through the ownership of state roads). Thus, a State could be required to designate exclusive bus lanes and purchase additional buses, since those are valid regulations of state roads as "indirect" sources (*id.* at 36a). The court also found federal power extended to requiring the States to prohibit the use of state roads by vehicles that do not comply with federal standards, but it determined that that power could not constitutionally extend to requiring that the State implement federally promulgated programs to identify non-conforming vehicles (*id.* at 40a–49a). The court thus upheld the exclusive bus lane and increased bus fleet regulations but remanded the inspection and maintenance and the retrofit regulations to the Administrator to promulgate complete, federally enforceable regulations as necessary to cure the deficiencies in the state plans (*id.* at 48a–49a).

SUMMARY OF ARGUMENT

The Administrator's conclusion that the States are responsible as owners and operators of the public roads for the pollution from motor vehicles is reasonable and consistent with previous decisions of this Court and

the Congress in related fields. Moreover, the Act authorizes him to direct the States to control the pollution caused by the functioning of the roads. The Constitution does not prohibit this narrow intrusion into the State's activities.

Section 110 of the Act requires that each State must have an implementation plan providing for the attainment of primary ambient air quality standards throughout the State within three years. If a State fails to propose an adequate implementation plan, the Administrator must promulgate one. The 1970 Amendments to the Clean Air Act make no distinction between plans proposed by the States and substitute plans promulgated by the Administrator; both must include effective transportation control measures if necessary to achieve the ambient air quality standards, and the State must comply with these measures. This is demonstrated not only by the language and structure of Section 110, but also by the fact that Section 113(a)(1) provides that whenever the Administrator finds that "any person" is in violation of an applicable implementation plan, the Administrator shall take steps to compel such person to comply with the plan's requirements. The term "person" includes a State (Section 302(e)). The Act and its legislative history both make clear that Congress intended to require the States to conform their pollution-creating activities to federal standards, and that it recognized that those activities included the ownership and operation of public highways.

As so interpreted, the Act is constitutional. The

Commerce Clause amply supports a federal requirement that the States control the pollution they cause, directly or indirectly. The congressional findings that air pollution has an adverse impact on the national health and economy and that local controls have proven inadequate are amply supported by the Act's legislative history.

The requirement that a State operate its highways in a way which limits the pollution they cause does not threaten the separate and independent existence of the State (cf. *National League of Cities* v. *Usery*, No. 74–878, decided June 24, 1976). That requirement imposes no substantial costs upon the States nor does it displace a wide range of state decisions about how traditional state functions will be performed. Instead, the regulations at issue here are narrowly drawn to affect only one area of state activity—its transportation policy—and only that part of the activity that specifically creates the pollution problem. Even in that narrow area, state policies are displaced only to the extent necessary to assure compliance with federal standards and each State remains free to replace the federal regulations with adequate measures of its own choosing. None of the required programs need be expensive; the States will not be required to make substantial re-allocations of resources available for other public services in order to satisfy the federal requirements. Moreover, the requirements at issue here, like those in *Fry* v. *United States*, 421 U.S. 542, reflect the need for federal action to combat a national emergency. Finally,

the fact that the regulations require some affirmative state action does not render them unconstitutional.[11]

ARGUMENT

INTRODUCTION

Contrary to the court's statements in *Brown* v. *Environmental Protection Agency*, the Administrator's argument is not that a State's[12] exercise of its governmental power over commerce is itself an economic activity subject to federal control under the Commerce Clause (Pet. No. 75–909, App. 27a–30a).[13] The Administrator claims only that the States, no less than private individuals, may be required to take steps to reduce the

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[11] The Commonwealth of Virginia is not required, as it claims, to purchase buses in contravention of the interstate compact to which it is a party. Instead, 40 C.F.R. 52.2435(e) simply requires the Commonwealth to provide assurances consistent with the compact that commitments for the bus purchases have been made by the parties to the compact. The Commonwealth itself agreed to contribute to bus purchases in the plan it submitted to the Administrator. In any event, the Commonwealth's responsibility to operate its highways in a way which reduces air pollution to acceptable levels cannot be avoided by the manner in which it has chosen to make public transportation available to its citizens.

[12] Hereafter, except when the context indicates otherwise, references to a "State" include local governments and the District of Columbia (see Section 302(d)(e)).

[13] The Administrator's position is similarly misconceived in an article written by a former law extern of Judge Sneed. Salmon, *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 Colum. Jour. of Env. Law 290, 324 *et seq.* (1976).

pollution caused by their own activities,[14] and that it makes no difference whether the state activity causes the pollution directly by, for example, operating municipal incinerators and state vehicles, or indirectly, by permitting private vehicles to use the state highways in a way that causes unacceptable levels of pollution. In either case, the Administrator may require the State to conduct its pollution-causing activities in a manner consistent with the reduction of air pollution. The State is, in either case, subject to federal regulation only to the extent it is responsible for the pollution, and only when its responsibility stems not from mere failure to regulate private activities, but from its ownership and control of the facilities used in the process of contamination of the air. The power asserted by the Administrator is only over the State as polluter, not over the State as State.

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[14] The Administrator has never asserted any power to compel the State to carry out its governmental responsibilities under an implementation plan by, for example, monitoring ambient air quality and enforcing the emission controls applicable to private stationary sources. Nor does he contend that he can direct the State to adopt laws or regulations creating transportation control plans that comply with the Act (see Pet. No. 1055, App. 27a-29a; Pet. No. 75-909, p. 17, n. 15). He thus concedes the necessity of removing from the regulations all requirements that the States submit legally adopted regulations; the regulations contain no requirement that the State adopt laws. If the State fails to adopt an adequate plan, the Administrator must promulgate a comprehensive substitute plan, specifying such matters as the types of vehicles to be inspected, the standards that must be met, and the frequency of inspection. The State must then implement the program by establishing the necessary inspection facilities, conducting the inspections, refusing to register non-conforming vehicles, and enforcing its registration laws.

Although two of the three courts below agreed that a State may be required to conform its pollution-creating activities to federal standards,[15] they failed to recognize that the ownership and operation of public highways is such a pollution-creating activity.[16] Recognition of that principle is, however, fundamental to the Administrator's position on both the statutory and constitutional issues here presented. The principle rests on a firm factual basis, and there is substantial precedent for holding persons responsible for the indirect, as well as the direct, results of their activities.

Before promulgating substitute transportation control plans, the Administrator spelled out the factual basis for the conclusion that a State may properly be required to control the pollution emanating from the roads it owns and operates (38 Fed. Reg. 30632–30633, November 6, 1973):

> Transportation is a necessary service. In our society, the form in which it is provided depends overwhelmingly on the regulatory, taxing and investment decisions made at all levels of government.

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[15] Pet. No. 75-909, App. 10a-11a; Pet. No. 75-1055, App. 36a; the court in No. 75-960 did not address the issue.

[16] The court in *District of Columbia* v. *Train* (Pet. No. 75-1055, App. 36a, 41a) did recognize this principle to a limited extent; it agreed that the State's responsibility as an indirect creator of pollution on public roads justified requiring it to establish exclusive bus lanes, to purchase additional buses, and to prohibit use of these roads by cars not conforming to federal standards. But it concluded that the State's responsibility did not extend to implementing inspection or retrofit programs to identify non-conforming cars (*id.* at 28a-33a, 37a-49a). The Administrator contends that the court of appeals erred in this respect.

By building and maintaining roads and highways, by licensing vehicles and operators, by providing a system of traffic laws, and in many other ways, government has encouraged the growth of automobile use to its present levels. There is nothing inevitable about such a choice. Governments could equally well have chosen to discharge their basic function of maintaining a transportation system in ways that would have discouraged the use of single-passenger automobiles, and encouraged the use of mass transit. But often they have not.

The production of food, electricity, and other consumer and industrial goods is as necessary in our society as transportation. In each case, the Clean Air Act authorizes regulations requiring such an activity, whether State or private, to be undertaken in the least polluting way in order to attain and maintain the air quality standards. There is no valid distinction between such production facilities and the State-owned automotive transportation facilities. In a comparable situation, the Supreme Court has held that State-owned rail transportation facilities must comply with Federal safety regulations [*United States* v. *California*, 297 U.S. 175].

A direct source of air pollution is one

from which pollution is emitted directly into ambient air. Direct sources include not only automobiles and other vehicles, but also the facilities on which they are located during their operation—parking facilities and roads. Pollution is emitted directly into the ambient air from such facilities, and often the most feasible method of reducing it is by imposing restrictions on their owners and operators.

Many such facilities may also be viewed as indirect sources of air pollution. An indirect source is one that encourages mobile source pollution at locations not necessarily coincident with the source itself by serving as a trip attraction for automobile drivers, or which provides a parking or driving convenience. Thus, the availability of ample low-cost parking facilities and high-speed freeways influences individuals to use vehicles with as few as one person in them, rather than less-polluting modes of transit. Such facilities may legitimately be charged not only with the pollution arising directly from their premises, but also with the total pollution in the region emitted by the traffic increase which they encourage.

For these reasons, the Administrator has concluded that regulations placing restrictions on parking and on the use of

road space are essential to reduce the amount of air pollution generated by automobiles, and that they are valid exexercises of EPA's regulatory authority.

The Administrator is also promulgating regulations requiring that vehicles allowed to operate on public roads be inspected or "retrofitted" with emission control equipment. Use of public roads by large numbers of publicly registered and regulated vehicles without either proper maintenance or adequate control equipment also causes damage to health. The requirement that the road owners and the licensing and regulating authorities prohibit such use is a reasonable means of preventing such damage.

Direct Federal enforcement and massive, duplicative Federal programs aimed at vehicles on an individual basis were not the means contemplated by the Act to solve these problems. It is clearly necessary that implementation of transportation control plans be carried out at the State and local level. The Chairman of the House Committee that reported out the amendments to the Act described their purpose as follows:

> If we left it all to the Federal Government, we would have about everybody on the payroll of the United States. We know this is not

> practical. * * * [116 Cong. Rec. 19204 (1970).]

The Administrator's conclusion that indirect, as well as direct, sources of pollution are subject to control under the Act has been upheld in several circuits. *South Terminal Corporation* v. *Environmental Protection Agency*, 504 F. 2d 646, 668–669 (C.A. 1) (control of parking facilities); *Friends of the Earth* v. *Environmental Protection Agency*, 499 F. 2d 1118, 1125 (C.A. 2) (on-street parking restrictions); *District of Columbia* v. *Train*, 521 F. 2d 971 (Pet. No. 75–1055, App. 36a, 41a) (bus lanes, bus purchases, and prohibition of road use by nonconforming vehicles); *Pennsylvania* v. *Environmental Protection Agency*, 500 F. 2d 246, 261 (C.A. 3) (inspection and maintenance programs, retrofitting, bikeways, bus lanes, and parking restrictions).[17]

This Court has recognized similar indirect responsibilities in closely analogous situations. It has held that an airport, and not the airlines that use it, takes the air easement over adjacent lands damaged by aircraft

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[17] It is not a novel idea that those who provide transportation facilities for use by others are responsible for controlling the manner in which the facilities are used. For instance, 45 U.S.C. 6 requires that "[a]ny common carrier * * * by railroad * * * permitting to be hauled or used on its line any car in violation of [federal safety requirements] * * * shall be liable to a penalty of $250 for each and every such violation". That statute was applied in *United States* v. *Northwestern Pac. R. Co.*, 235 Fed. 965, 968-969 (N.D. Cal.), to hold the railroad owning the tracks responsible for defective cars hauled by another over its rails. The statute also applies to a State which operates a railroad, *United States* v. *California*, 297 U.S. 175. Cf. 49 U.S.C. (Supp. V) 1511(a) (airlines may not transport persons or property unless permission to conduct security inspection is granted).

noise (*Griggs* v. *Allegheny County*, 369 U.S. 84, 89). The airplanes that created the noise were no more the property of the airport owners than the private cars are the property of the States. But the airport owner, like the highway owner, indirectly caused the adverse environmental effect and was legally responsible for providing the remedy. Similarly, the Court has held that a State is responsible under the federal common law of nuisance for the discharge of sewage into public waters, even though it is evident that the State did not itself directly create the pollutants discharged. *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 106–108. As the State can be required to limit the adverse effects on public waters of pollution discharged by others using the sewer system, so it can be required to limit the adverse effect on the public air of pollution discharged by others using its highways. The principle remains the same: an owner or operator of a facility is a polluter, whether he causes the pollution directly or indirectly.[18]

I.

THE ADMINISTRATOR HAS AUTHORITY UNDER THE CLEAN AIR ACT TO PROMULGATE REGULATIONS ENFORCEABLE AGAINST THE STATES AS POLLUTERS.

As this Court stated in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 63–64, Congress

[18] We recognize that when a State, private person, or corporation causes pollution indirectly, others share responsibility for the pollution. But that means only that the federal controls can be applied to each of the groups jointly responsible, not that joint action insulates any group that bears a substantial responsibility.

reviewed the disappointing performance of the States under earlier statutes encouraging and assisting them to take effective steps to control air pollution, and found it necessary to approach the problem differently by "taking a stick to the States" in the 1970 Amendments to the Clean Air Act. Under these amendments, "the States were no longer given any choice as to whether they would meet [the] responsibility * * * to attain air quality of specified standards, and to do so within a specified period of time" (*id.* at 64–65). See also *Union Electric Co.* v. *Environmental Protection Agency*, No. 74–1542, decided June 25, 1976, slip op. 9; *Pennsylvania* v. *Environmental Protection Agency, supra*, 500 F. 2d at 258. One of the choices removed from the States was whether they would conduct their own pollution-causing activities in accordance with applicable implementation plans—the congressional "stick" included the grant of authority to the Administrator to compel state compliance with such plans. In refusing to recognize this basic change in approach, the courts below misread the Act[19] and failed to recognize its remedial purposes. See *Abbott Laboratories* v. *Portland*

[19] They did so in order to avoid constitutional questions (Pet. No. 909, App. 9a, 24a; Pet. No. 960, App. 27a-28a). But as Judge Friendly points out, this technique of statutory construction is unlikely to reflect congressional intent (Friendly, "Mr. Justice Frankfurter and the Reading of Statutes", in *Benchmarks* 210-212 (1976)): "It does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them. For there is always the chance, usually a good one, that the doubts will be settled favorably, and if they are not, the conceded rule of

Retail Druggists Assoc., Inc., No. 74–1274, decided March 24, 1976; *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491; *Weinberger* v. *Bentex Pharmaceuticals*, 412 U.S. 645, 653.

A. SECTION 110 REQUIRES THE ADMINISTRATOR TO PROMULGATE AN ADEQUATE IMPLEMENTATION PLAN IF A STATE FAILS TO DO SO.

The requirement of Section 110 of the Act is absolute: each State must have an implementation plan that provides for the attainment of the primary ambient air quality standards in its air quality control regions within three years from the date the plan goes into effect (Section 110(a)(2)(A)(i)). See *Union Electric*

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construing to avoid unconstitutionality will come into operation and save the day. * * *

"Although questioning the doctrine of construction to avoid constitutional doubts is rather like challenging Holy Writ, the rule has always seemed to me to have almost as many dangers as advantages. For one thing, it is one of those rules that courts apply when they want and conveniently forget when they don't —some, perhaps, would consider that to be a virtue. * * * Some considerations advanced in its favor, such as the awesome consequences of 'a decree of unconstitutionality,' overlook that if the Court finds the more likely construction to be unconstitutional, another means of rescue—the principle of construing to avoid unconstitutionality—will be at hand. The strongest basis for the rule is thus that the Supreme Court ought not to indulge in what, if adverse, is likely to be only a constitutional advisory opinion. While there is force in this, the rule of 'construing' to avoid constitutional doubts should, in my view, be confined to cases where the doubt is exceedingly real. Otherwise this rule, whether it be denominated one of statutory interpretation or, more accurately, of constitutional adjudication—still more accurately, of constitutional nonadjudication—is likely to become one of evisceration and tergiversation." (Footnotes omitted.)

Co. v. *Environmental Protection Agency, supra*, slip op. at 10–17. Extensions of time are permitted, but only for up to a total of three years.[20] The States are to develop the plans, and so long as the plan selected will in fact attain and maintain the primary air quality standards, "the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79.[21]

Depending on the kind of pollution sources found in a State and the severity of its pollution problems, attainment of the primary standards by the statutory deadline may require control of State and Federal sources as well as those owned by private parties.[22] Moreover, to be adequate a plan may have to contain requirements for control of pollution not only from conventional State sources, such as incinerators, but also from State-owned indirect sources, such as parking garages and highways.

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[20] Section 110(e) authorizes the Administrator, upon application of a Governor of a State, to extend the three-year period by up to two years if the "necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period." Section 110(f) authorizes the Administrator to grant an additional year's extension, also for technological reasons, but only if appropriate findings are made after an adjudicatory hearing.

[21] The State must, however, include transportation controls (and specifically periodic inspection and testing of motor vehicles) in its plan if necessary to attain or maintain air quality standards (Section 110(a)(2)(B),(G)).

[22] Section 118 of the Act (42 U.S.C. 1857f) requires that federal installations conform to established emissions limitations and compliance schedules. See *Hancock* v. *Train*, No. 74-220, decided June 7, 1976.

The failure of a State to develop an adequate plan does not excuse it from the requirement of Section 110(a)(2). That requirement remains absolute; the State must have an adequate plan. In those circumstances, the Act does not allow the Administrator to grant the State an additional extension of time or to compromise timely attainment of the primary standards by approving plans that omit measures necessary for that purpose. The Act simply commands the Administrator to prepare a plan "for a State" (Section 110(c)). In doing so, he necessarily chooses among the variety of emission limitations originally available to the State.[23]

B. A SUBSTITUTE IMPLEMENTATION PLAN MAY INCLUDE PROVISIONS APPLICABLE TO THE STATE AS A POLLUTER.

If control of state-operated sources of pollution is necessary to attain the primary air quality standards within the specified time, such controls must be included in the State's implementation plan, whether the plan is promulgated by the State or the Administrator. Nothing in the 1970 Amendments to the Clean Air Act suggests that the Administrator, in promulgating measures "for a State" under Section 110(c), is more restricted than the State would have been in submitting

[23] As a practical matter, the Administrator will rarely make choices inconsistent with those of the State. Instead, as he did in these cases, he will supplement and modify the state choice only as necessary to assure attainment of the ambient air quality standards. See note 7, *supra*.

a plan for approval under Section 110(a)." Instead, Section 110 treats identically measures adopted by a State and measures promulgated by the Administrator; whether a plan is wholly adopted by a State, wholly promulgated by the Administrator, or a mixture, it is the "applicable implementation plan" (Section 110(d)). Pet No. 75–1055, App. 20a–22a (*District of Columbia* v. *Train*); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 478 F. 2d 875, 888 (C.A. 1).

As the court in *South Terminal Corporation* v. *Environmental Protection Agency, supra*, 504 F. 2d at 668, determined:

> The statutory scheme would be unworkable were it read as giving to EPA, when promulgating an implementation plan for a state, less than those necessary measures allowed by Congress to a state to accomplish federal clean air goals. We do not adopt any such crippling interpretation.

Other courts agree that EPA may regulate the States in their role as polluters; as for example, when they own and operate conventional sources such as incinerators. See *Brown* v. *Environmental Protection Agency* (Pet. No. 75–909, App. 10a–11a); *District of Colum-*

[24] The Administrator's choices may be more restricted in one respect. Although a State may adopt more stringent measures than necessary to reach the ambient air quality standards (Section 116), the Administrator has no similar power to impose such measures on the States; he must prescribe the least burdensome means of achieving the ambient air quality standards. See also note 28, *infra*.

bia v. *Train* (Pet. No. 75–1055, App. 36a); *Commonwealth of Pennsylvania* v. *Environmental Protection Agency*, 500 F. 2d 246, 256–259 (C.A. 3); *Friends of the Earth* v. *Carey*, 535 F. 2d 165 (C.A. 2); *Friends of the Earth* v. *Environmental Protection Agency*, 499 F. 2d 1118, 1124 (C.A. 2); *Metropolitan Washington Coalition* v. *District of Columbia*, 511 F. 2d 809 (C.A.D.C.).

Because EPA may regulate States in their role as polluters, it may regulate the States in their role as the owners and operators of polluting transportation facilities. The Act itself requires state implementation plans to provide for "periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards" (Section 110(a)(2)(G)) and for other "transportation controls" (Section 110(a)(2)(B)) to the extent necessary for timely attainment of the ambient air quality standards.[25] As this language and its legislative history[26] demonstrate, Congress in-

[25] Moreover, as we discuss later (pp. 36-40, *infra*), Sections 113 and 304 clearly contemplate suits to compel States to conform their pollution-creating activities to applicable implementation plans, thus unmistakably indicating that Congress intended that these plans would control State activities, as well as those of private polluters.

[26] See, *e.g.*, S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2, 12-14, 31 (1970). The Report states at p. 13:

> The Committee recognizes that during the next several years, the attainment of required ambient air quality in many of the metropolitan regions of this country will be impossible if the control of pollution from moving sources depends solely on emission controls. The Committee does not intend that these areas be exempt from meeting the standards. Some regions may have to establish new transportation programs and systems combined with traffic control regulations and restrictions in order to achieve ambient air quality standards for pollution agents associated with moving sources.

The House Report reflects the same understanding (H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 3-4 (1970)). The legislative history is reviewed in *Pennsylvania* v. *Environmental Protection Agency*, *supra*, 500 F. 2d at 258-259, and *District of Columbia* v. *Train*, Pet. No. 75-1055, App. 31a-33a. See also *Salmon*, *supra*, 2 Colum. Jour. of Env. Law at 308-324. Virtually every reference to how transportation control measures are to be implemented places the responsibility on the States. Thus, the legislative history cited by the court in *Brown* v. *Environmental Protection Agency*, Pet. No. 75-909, App. 19a-24a, concerning the mechanism for enforcing implementation plans generally, is largely irrelevant.

tended where necessary to require that States administer transportation control programs, particularly inspection and maintenance programs. The courts in *District of Columbia* v. *Train* (Pet. No. 75–1055, App. 30a–33a) and *Commonwealth of Pennsylvania* v. *Environmental Protection Agency*, *supra*, 500 F. 2d at 256–259, agree.[27]

Any possible doubt concerning the Administrator's authority to promulgate transportation control plans of the type involved here has been resolved by Congress itself. In legislation subsequent to the 1970 amendments, Congress has acted to bar promulgation of particular transportation control measures; but the general strategy of requiring States to implement such

[27] A number of States, including four of the respondents here, adopted and submitted such measures as part of their plans. See, *e.g.*, 38 Fed. Reg. 10119-10120 (April 24, 1973) (Arizona, Maryland, Virginia); 38 Fed. Reg. 11114 (May 4, 1973) (District of Columbia). See also note 7, *supra*.

measures, where necessary, was left unaltered.[28] This alone indicates that Congress approved that strategy. See *Zemel* v. *Rusk*, 381 U.S. 1, 11; *Federal Energy Administration* v. *Algonquin SNG, Inc.*, No. 75–382, decided June 17, 1976; *Canada Packers Ltd.* v. *Atchison T. & S. F. Ry. Co.*, 385 U.S. 183, 184. Cf. *Train* v. *Colorado Public Interest Research Group, Inc.*, No. 74–1270, decided June 1, 1976, slip op. 15–22.

There is also explicit legislative history to that effect. The House version of the Energy Supply and Environmental Coordination Act of 1974, 88 Stat. 246,

[28] In 1974, Congress amended the Act to preclude the Administrator from requiring "surcharges" on parking and to void previously promulgated requirements of that type. Section 110(c)(2)(B), as added by Section 4(b) of the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246, 42 U.S.C. (Supp. V) 1857c-5(c)(2)(B). In the same amendments, Congress authorized the Administrator to defer requirements for review of new parking facilities, with the understanding that such authority would in fact be exercised. See Sections 110(c)(2)(A), 110(c)(2)(C); H. R. Rep. No. 93-763, 93d Cong. 2d Sess. 88-90 (1974). Congress made clear, however, that the Administrator remained free to *approve* surcharge and parking review measures if States submitted them, thus showing its awareness of the difference between voluntary and compelled State action in this area. Sections 110(c)(2)(B), 110(c)(2)(C). Because Congress clearly focused on this difference in enacting the foregoing amendments, its refusal to preclude compelled state action on other transportation control measures is all the more significant. In subsequent legislation, Congress imposed various restrictions on the use of appropriated funds to administer or promulgate measures involving regulation of parking facilities, but again imposed no restrictions on such EPA measures as inspection and maintenance and bus lane requirements. See Section 510 of Pub. L. 93-563, 88 Stat. 1822, 1843; Section 407 of Pub. L. 94-116, 89 Stat. 581, 600; Section 406 of Pub. L. 94-378, 90 Stat. 1095, 1109.

257–258, contained a provision that would have prohibited the Administrator from requiring States and localities to create preferential bus and carpool lanes, unless such a measure was subsequently authorized by Congress, 119 Cong. Rec. 41300, 41305 (1973).[29] The conference committee deleted the provision and explained its action as follows (*e.g.*, S. Rep. No. 93–663, 93d Cong., 1st Sess. 88–90 (1973)):

> The other related provision of the House amendment has been modified to provide that only parking surcharges (rather than surcharges, management of parking supply, and bus/carpool lanes) must receive the explicit authorization of the Congress before they may legally be imposed by the Environmental Protection Agency. The conference substitute would therefore continue to permit preferential bus/carpool lanes to be implemented by the Environmental Protection Agency as set forth in current transportation control plans. In implementing requirements for bus/carpool lanes, the basic responsibility rests with State and local governments and transportation agencies * * *.

[29] The sponsor of this amendment, Mr. Moss, offered it to counteract, as he phrased it, the "order to provide carpool lanes or bus lanes" applicable to "California, * * * Texas and * * * some of the New England States." 119 Cong. Rec. 41300 (1973). Those "orders" were the transportation control plans, and the measures complained of are, in the case of California, among those at issue in this case.

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> In adopting [restrictions involving parking surcharges and review of new parking facilities], the conferees do not intend to question either the need for, or the authority of the Administrator of the Environmental Protection Agency to impose, transportation control plans.

Congress' failure to enact an amendment that would have explicitly inhibited the Administrator from requiring States to create bus lanes supports the Administrator's authority under the Act to require bus lanes, and hence other transportation programs, to be implemented by the States. See *Train* v. *Colorado Public Interest Research Group, Inc.*, No. 74–1270, decided June 1, 1976 (slip op. 15–20); *Zemel* v. *Rusk*, 381 U.S. 1, 11.

C. SECTION 113 OF THE ACT AUTHORIZES THE ADMINISTRATOR TO ENFORCE IMPLEMENTATION PLAN REQUIREMENTS APPLICABLE TO THE STATE IN ITS ROLE AS POLLUTER.

The issue before this Court is the Administrator's authority to promulgate plans binding on the States, not the means available for enforcing such plans. Nevertheless, discussion of the enforcement sections of the Act (Sections 113 and 304) is appropriate, both because the court of appeals in No. 75–909 relied primarily on its reading of Section 113[30] in concluding that the Administrator lacked statutory authority to promulgate the regulations at issue, and because both sections, correctly interpreted, support the existence of that authority.

Section 113 provides for federal enforcement of an implementation plan when the State fails to enforce it.[31] It distinguishes carefully between violations of a

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[30] Section 113(a)(1) provides that whenever the Administrator finds that "any person is in violation of any requirement of an applicable implementation plan," he shall notify the person and the State involved of his finding. If the violation is not corrected within 30 days, the Administrator "may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action" in the appropriate district court (*ibid.*). In the civil action the court may issue a permanent or temporary injunction against any person who violates or fails or refuses to comply with an order or any requirement of an applicable implementation plan (Section 113(b)).

[31] Senator Muskie, in a "Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970" which he provided to the Senate for its use in considering the bill as reported out of conference, emphasized the primary responsibility of the States when he described the procedures provided in Section 113 (116 Cong. Rec. 42385 (1970)):

> Federal enforcement under section 113 leaves the primary responsibility with the States for enforcing requirements under implementation plans. The Administrator can issue an abatement order to a polluter or go to court seeking an injunction only after 30 days' notice to an individual polluter [Section 113(a)(1)], or 30 days after notifying the State that the Federal Government is generally assuming enforcement powers in that State because of a widespread failure of States' enforcement [Section 113(a)(2)]. This gives States 30 days in which to take appropriate action themselves.

plan (Section 113(a)(1)), and the failure of a State to enforce a plan (Section 113(a)(2)). This dichotomy, we submit, recognizes the difference, upon which the Administrator relies, between the State as polluter and the State as regulator, and permits the Administrator to compel the State, like any other owner-operator of a pollution source, to comply with the requirements of an applicable implementation plan.[32]

The language of Section 113(a)(1) is clear:

> (a)(1) Whenever, on the basis of any information available to him, the Administrator finds that *any person* is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section. [Emphasis added.]

[32] While Section 113(c) provides for criminal sanctions, the Administrator does not intend to seek criminal penalties against State officials. See BNA Environment Reporter, Current Developments, v. 5, no. 21, p. 755 (September 20, 1974). His first approach will be to obtain compliance with the provisions of applicable implementation plans by means of administrative orders pursuant to Section 113(a)(1), and administrative conferences pursuant to Section 113(a)(4). If these efforts should fail, the Administrator would then seek injunctive relief.

The term "person" includes a State (Section 302(e)), and an "applicable implementation plan" includes a substitute plan promulgated by the Administrator (Section 110(d)).

The court in *Brown* (Pet. No. 75–909, App. 17a) concluded that despite Section 302(e), the word "person" as used in Section 113(a)(1) does not include a State because both the person violating the Act and the State must be notified of a violation.[33] But the fact that Congress, in Section 113, required notification to the State in its role as regulator could hardly mean that Congress intended to exempt the State from Section 113 sanctions in its role as polluter. While the requirement of notice to the State as regulator may seem superfluous when it is also receiving notice as a polluter, it is reasonable to expect that a state regulatory agency, when notified of a violation by a state agency responsible for the operation of a pollution source, will take steps to bring the State into compliance. If both the State official responsible for the polluting activity (*e.g.*, the incinerator manager) and the agency responsible for pollution control (*e.g.*, the state environmental agency) are notified, both have an opportunity to bring about compliance before the Administrator must act.[34] Section 113(a)(1) thus simply recognizes, as

[33] Even under the *Brown* court's analysis, the "person" referred to in Section 113(a)(1) must sometimes be a State, since the court recognized that the Act "permits sanctions against a state that pollutes the air" (Pet. No. 75–909, App. 11a). The court evidently recognized the inconsistency in its analysis (*id.* at 16a).

[34] In practice, it may not be necessary to send separate notices, cf. *Friends of the Earth* v. *Carey*, 535 F. 2d 165, 174–176 (C.A. 2).

does the Administrator, that the State may act in two roles—either as the owner-operator of a pollution source, or as the enforcer of an implementation plan—and that it is subject to federal compulsion only in the former role.

This reading of Section 113(a) is confirmed by Section 304, which provides for citizen suits against "any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation * * *."[35] From the language used in clause (ii) it is clear that a State is a "person" who may be sued under Section 304; otherwise the reference to the Eleventh Amendment would be meaningless. It would be extraordinary for Congress to have permitted suits against States by citizens under Section 304, but failed to provide the same authority under Section 113 to the Administrator, who is responsible for implementing the Act.[36]

[35] The requirement that the State manage its roads in a way which will control air pollution is an "emission standard or limitation." See *Friends of the Earth* v. *Environmental Protection Agency*, *supra*, 499 F. 2d at 1123–1124.

[36] It is not significant that Section 304 refers expressly to a governmental entity, while Section 113 does not. Congress evidently wanted to preclude any claim that the Act lacked the necessary "clear evidence of congressional purpose" to permit citizen suits against a State. See Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 Harv. L. Rev. 682, 689–691 (1976). No such problem exists with regard to the federal actions contemplated by Section 113(a)(1). *Id.* at 685.

II.

A STATE MAY CONSTITUTIONALLY BE REQUIRED TO OPERATE ITS TRANSPORTATION SYSTEMS SO AS TO MINIMIZE THE POLLUTION THOSE SYSTEMS CAUSE.

In *National League of Cities* v. *Usery*, No. 74–878, decided June 24, 1976, the Court held that some state activities, although apparently within the reach of Congress' power under the Commerce Clause because of their effect on interstate commerce, are nevertheless immune from federal regulation that "displace[s] the States' freedom to structure integral operations in areas of traditional governmental functions * * *" (slip op. at 18).[37] Accordingly, the constitutionality of the Clean Air Act's direction that the States control the pollution they cause, directly or indirectly, depends not only on the traditional tests for determining whether activities are within the reach of Congress' power under the Commerce Clause, but also on the impact of the federal requirements on state sovereignty. We discuss first the effect of the state activities on interstate commerce rather than what is or is not an "integral governmental function" of a State (*National League of Cities* v. *Usery*, *supra*, slip op. at 21); to do otherwise would be to set "the Tenth Amendment on its head by requiring that State power, or at any rate a *part* of it, be defined prior to the definition of national power * * *." Corwin, *The Commerce Power versus States Rights* 125–126 (1936).

[37] However, such state activities might be subject to federal regulation under some other constitutional provisions. See *id.* at 18, n. 17; *Fitzpatrick* v. *Bitzer*, No. 75–251, decided June 28, 1976.

A. FEDERAL REGULATION OF THE CAUSES OF POLLUTION IS WITHIN THE POWERS OF CONGRESS UNDER THE COMMERCE CLAUSE.

The scope of the commerce power is broad enough to permit the federal government to control the causes of pollution. Pollution constitutes a burden on interstate commerce in a variety of ways. Congress found, as it stated in Section 101(a)(2) of the Act, that:

> the growth in the amount and complexity of air pollution * * * has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation.

The commerce power permits the Congress to act to protect against each of the dangers identified in the findings. It may protect the national economy against "inimical or destructive" forces, *North American Co.* v. *Securities & Exchange Commission*, 327 U.S. 686, 705; prevent interference with transportation, *Gibbons* v. *Ogden*, 9 Wheat. 1, 190–197; and promote the health and welfare of the Nation's citizens, *Cleveland* v. *United States*, 323 U.S. 329, 333. Moreover, there can be no doubt about Congress' power under the Commerce Clause to regulate activities that might be characterized as "local," such as the release of pollutants, when these have substantial interstate effects. *E.g.*, *Perez* v. *United States*, 402 U.S. 146; *Heart of Atlanta Motel,*

Inc. v. *United States*, 379 U.S. 241, 255; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125.[38]

The existence of such effects here was amply demonstrated during consideration of the Clean Air Amendments of 1970.[39] Photochemical oxidants (smog) and hydrocarbons can cause physical ills such as temporary and permanent damage to lung functions, aggravation of asthma, and eye, nose, and throat irritation; they also cause damage to vegetation, clothing fabric, rubber and dyes.[40] Moreover, the effects are accelerat-

[38] The Commerce Clause is broad enough to permit federal controls over activities which indirectly affect interstate commerce. *Wickard* v. *Filburn*, 317 U.S. 111, 123–124; *Gibbons* v. *Ogden*, *supra*, 9 Wheat. at 195–196, 203–206. Thus, Congress may regulate indirect, as well as direct, pollution sources.

[39] See Hearings on S. 3229, S. 3466, and S. 3546 (Air Pollution—1970, Parts 1–5) before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 91st Cong., 2d Sess. 345–346, 349–352, 474–475, 573, 1189, 1193, 1213, 1219, 1281, 1351, 1479, 1490, 1576–1577, 1596 and 1639–1650 (1970); S. Rep. No. 91–1196, 91st Cong., 2d Sess. 1 (1970); H. R. Rep. No. 91–1146, 91st Cong., 2d Sess. 7 (1970); 116 Cong. Rec. 19204–19205 (1970) (Cong. Staggers); 116 Cong. Rec. 19208–19209 (1970) (Cong. Jarman); 116 Cong. Rec. 19209–19210 (1970) (Cong. Rogers); 116 Cong. Rec. 19216 (1970) (Cong. Keith); 116 Cong. Rec. 32920–32922 (1970) (Sen. Baker); 116 Cong. Rec. 32919–32920 (1970) (Sen. Spong); 116 Cong. Rec. 33091–33093 (1970) (Sen. Murphy); 116 Cong. Rec. 33115–33117 (1970) (Sen. Cooper).

[40] Department of Health, Education, and Welfare, No. AP–63, *Air Quality Criteria for Photochemical Oxidants*, 10–3 to 10–13 (March, 1970). In 1974, a study performed by the National Academy of Sciences estimated that air pollution causes on the order of fifteen thousand deaths, fifteen million days of restricted activity, and seven million days spent in bed each year in the United States and that as many as four thousand deaths and four million days of illness each year may be attributed to automobile emissions alone. Committee Print, Serial

ing. In 1963, the estimated annual costs of health problems related to air pollution exceeded two billion dollars;[41] by 1968 they were more than six billion dollars,[42] and by 1975 they were more than ten billion dollars.[43] In 1975, the total cost of air pollution, including damage to buildings and vegetation, was estimated to be more than twenty-six billion dollars.[44]

The futility of leaving control of air pollution exclusively to the States is clear. As this Court has noted, the 1970 Clean Air Amendments responded to the failure of the States to cope with the mounting problems, despite offers of federal technical and financial assistance. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64. Cars frequently travel across state lines, and smog and other pollutants drift hundreds of miles from the city of origin; no one State or locality

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No. 93–24, Senate Committee on Public Works, Air Quality and Automobile Emission Control, Report by the Coordinating Committee on Air Quality Studies, National Academy of Sciences, National Academy of Engineering, 93d Cong., 2d Sess., pp. 11–13 (1974) (hereafter "NAS report"). The same study estimated that particularly susceptible groups in the population constitute about forty million people, or about one fifth of the total population. *Id.* at 7–8.

[41] Barrett and Waddell, *Cost of Air Pollution Damage: A Status Report*, Environmental Protection Agency 11 (February, 1973).

[42] *Id.* at 59.

[43] Leung and Klein, *The Environmental Control Industry, An Analysis of Conditions and Prospects for the Pollution Control Equipment Industry* 24 (December, 1975).

[44] *Ibid.*

can solve the problem affecting its citizens.[45] In these circumstances, Congress rationally concluded that the lack of effective controls will unduly burden interstate commerce, and that this burden should be removed by the establishment of an effective national program.

In light of the foregoing considerations, the courts have upheld Congress' authority to regulate activities causing air pollution. *South Terminal Corporation* v. *Environmental Protection Agency, supra*, 504 F. 2d at 677; *Pennsylvania* v. *Environmental Protection Agency, supra*, 500 F. 2d at 259; *District of Columbia* v. *Train*, Pet. No. 75–1055, App. 33a.

B. THE SEPARATE AND INDEPENDENT EXISTENCE OF THE STATES IS NOT HERE THREATENED.

While the Commerce Clause, together with the Necessary and Proper Clause, serves as a solid basis for the regulations at issue, under *National League of Cities* v. *Usery, supra*, the effect of the federal regulations on the functioning of the States as sovereign entities must also be assessed. Only if the federal intrusion threatens the separate and independent existence of the States and their ability to function effectively in a federal system is the federal regulation

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[45] *E.g.*, 41 Fed. Reg. 28635 (July 12, 1976). See also State Air Pollution Implementation Plan Progress Report, July 1 to December 31, 1975, Environmental Protection Agency, pp. 46–47 (April, 1976); H.R. Rep. No. 94–1175, 94th Cong., 2d Sess. 113 (1976).

unconstitutional despite the basis for Congress' action in the Commerce Clause (slip op. at 11, 17, 21).[46]

This is a stringent test and the Court intended it to be such. Ours is not simply a federal system. It is a democratic system. The judiciary has never been the only—or even the primary—safeguard against regulation under the Commerce Clause[47] which, although enacted by the elected representatives in Congress, might have seemed to others excessive or unduly intrusive.[48]

In *National League of Cities*, "the substantial costs imposed upon the States" and Congress' "displacement of state decisions" regarding how state and local gov-

[46] The States' inherent sovereignty is also protected by the limitations on the reach of the Commerce Clause: "[t]he subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States." *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U.S. 453, 466. But this case does not involve federal legislation affecting an important state function and having only an attenuated connection to matters within the federal commerce power. Moreover, there is in this case a clear expression of congressional intent to control state-caused pollution. Compare *United States* v. *Bass*, 404 U.S. 336, 349.

[47] Chief Justice Marshall noted the primary safeguards over the exercise of the commerce power in *Gibbons* v. *Ogden*, 9 Wheat. 1, 197: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

[48] Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 558–559 (1954); Tribe, *supra* n. 36, at 694–695.

ernments traditionally "have arranged their affairs" represented, in the Court's view, a threat to state sovereignty sufficient to render the 1974 Fair Labor Standards Act Amendments unconstitutional (slip op. 13, 15). Neither factor is present in this case and the regulations at issue represent no such threat.

If upheld, the federal legislation involved in *National League of Cities* would, the Court stated, "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens" (slip op. at 17; footnote omitted).

In this case, however, the regulations at issue do not affect the full range of fundamental state activities; instead, they require only that the State operate its highways consistently with federal standards.[49] Rather than affecting almost all state employees and thereby reaching substantially all state activities, as the wage and hour laws did in *National League of Cities* (slip op. 2, 4, 13–14), the regulations here are

[49] Cf. *United States* v. *California*, 297 U.S. 175, holding that a state's operation of a railroad must be consistent with federal standards based on the Commerce Clause. The Court in *National League of Cities* (slip op. at 20, n. 18) specifically approved the holding in *United States* v. *California*, *supra*.

narrowly drawn to affect only that small part of the State's transportation policy which specifically creates the pollution problem. Moreover, the degree of federal intrusion is minimized because state policy is modified only to the extent necessary to attack the problem: the States are not to permit the operation on their highways of non-conforming vehicles, and are to encourage the use of buses in narrowly circumscribed ways.[50]

Federal intrusion is also minimized because the State is first given the opportunity to specify the methods by which it will attain the federal air quality standards; federal requirements are imposed only if the methods specified by the State will not achieve the federal standards. In fact, the federal requirements generally reflect the State's choice of the methods it prefers for attaining the ambient air quality standards;[51] the Administrator's regulations are then designed primarily to assure that the State's policy choices will in fact be carried out. Even after the Administrator has promulgated a substitute pollution control plan for the State, the State remains free to revise the plan if it prefers to use a different pollution control strategy to meet the national air quality standards.

[50] Moreover, the federal requirements apply only in those particular areas within the States where the air pollution problems are most serious.

[51] In developing substitute transportation plans, the Administrator considered "the severity of the pollution problem, the availability of control measures, the existing local control activities and conditions, the State transportation plans, the public hearing comments, the disruptive impact of certain measures, and the pollutant controlled.* * * If the States have submitted plans that are in part approvable, the Administrator has attempted to promulgate measures that supplement the approved portions [of] the measures included in the plan the State is expected to submit. The Administrator has also made many changes based upon constructive public hearing testimony on the proposed plans." 38 Fed. Reg. 30628 (November 6, 1973). See note 7, *supra*.

Thus, the means by which the federal standards are met remains within the control of the States—the federal government supplies the standards but it specifies the means only when the State declines to do so. It is anomalous to conclude, as did the courts below (Pet. No. 75–909, App. 30a–32a; Pet. No. 75–1055, App. 44a n. 26. Cf. Pet. No. 75–960, App. 30a–32a), that respect for state sovereignty forbids this carefully limited intrusion into state control over the operation of its highways, and permits instead only the substantially greater intrusion that would be involved if the federal government were itself to inspect and police all private vehicles using state highways, operate buses, and itself mark bus lanes.

Furthermore, in terms of increased costs, the pollution control requirements at issue here, unlike the wage and hour laws involved in *National League of Cities* (slip op. at 12), will not have a significant financial impact on the States. These requirements will therefore not force the States to reconsider the allocation of their resources, generally restructure the means by which they arrange their affairs, or curtail the services they provide their citizens.

None of the required programs need be expensive. A State may simply add the inspection for compliance with emission control standards to its existing periodic

automobile inspection program,[52] or it may contract with a private company to conduct the inspections, as Arizona has done (Ariz. Rev. Stat., Section 36–1775A (1974)).[53] In either case, fees may be charged the automobile owners. Indeed, in States that have a fee system, the inspection programs have generally returned a net profit. See *Status of Safety and Emissions Inspection in the Fifty States* (February 1976), Automotive Parts & Accessories Association.[54] The establishment of exclusive bus lanes is not expensive if existing lanes are set aside for bus use, as has been done in the downtown streets of Washington, D.C., by simply painting sym-

[52] As of February 1976, ten States in which the applicable implementation plans require inspection and maintenance programs had ongoing periodic passenger vehicle safety inspection programs; five such States had limited programs (*e.g.*, spot checks, inspections on vehicle transfers) and two had no such programs. See *Status of Safety and Emissions Inspection in the Fifty States* (February, 1976), Automotive Parts & Accessories Association.

[53] At least eight other inspection and maintenance programs are currently in operation. Shutler, *Overview of Inspection/Maintenance (I/M)*, Proceedings of the Fourth North American Motor Vehicle Emission Control Conference 102–104 (November 5–7, 1975).

[54] Section 105 (42 U.S.C. 1857c) provides grants for planning, developing, establishing, and maintaining programs for the prevention and control of air pollution. This provision refutes the assertion of petitioners in No. 75–1050, that the federal government has attempted to impose on the States the entire financial burden of controlling pollution. Instead, federal assistance to the States' efforts to control pollution has been steadily increasing, *Train* v. *Natural Resources Defense Council, Inc.*, *supra*, 421 U.S. at 63–64. In fiscal year 1975, state air pollution control agencies received more than 52 million dollars in federal support. *Progress in the Prevention and Control of Air Pollution in 1975*, Annual Report of the Administrator of the Environmental Protection Agency to the Congress of the United States, 139 (1975).

bols and erecting signs.[55] And state investment in additional buses is insignificant in relation to the kind of financial impact considered in *National League of Cities*.[56]

Thus, the costs to the States of limiting the pollution resulting from the use of state highways is not remotely comparable to the costs of complying with the wage and hour provisions involved in *National League of Cities*, and will not limit state choices concerning the proper allocation of resources in the way this Court found objectionable in that case. Indeed, if the estimates of the savings to be anticipated from achieving the primary air quality standards are credited,[57] compliance with the federal requirements may lead to savings in state expenditures for health, welfare and care of property that would more than offset the costs of the emission control programs.

If the regulations involved in this case need any further justification, it is supplied by the fact that "[t]he enactment at issue * * * was occasioned by an extremely serious problem which endangered the well-being of all

[55] None of the regulations at issue requires construction of bus lanes, but if that were necessary, federal aid is authorized, 23 U.S.C. (Supp. V) 142(a)(1); Pub. L. 93–643, 88 Stat. 2281, Section 120.

[56] Here again, substantial federal assistance is available. The Urban Mass Transportation Act of 1964, 78 Stat. 302, as amended, 49 U.S.C. 1601 *et seq.*, 49 U.S.C. (Supp. V) 1603(a), provides for federal grants of up to 80 per cent of the costs of public buses; see also 23 U.S.C. (Supp. V) 142(a)(2).

[57] The National Academy of Sciences has concluded that, taking total costs into account, the Nation could save from 2.5 to 10 billion dollars annually if automobile emissions were reduced so that the primary ambient air quality standards were achieved. NAS report, *supra* n. 40, at pp. 15, 121; see also H.R. Rep. No. 94–1175, 94th Cong., 2d Sess. 208 (1976).

the component parts of our federal system and which only collective action by the National Government might forestall." The quoted statement from *National League of Cities* (slip op. at 18) explained in part why the Court believed *Fry* v. *United States*, 421 U.S. 542, was correctly decided.[58] *Fry* upheld a wage freeze pursuant to the Economic Stabilization Act of 1970 as applied to state employees. The threat to the Nation from air pollution poses an emergency quite as serious as the threat of inflation, *Union Electric Co.* v. *Environmental Protection Agency*, No. 74–1542, decided June 25, 1976, slip op. 9, 8–17, and one quite as intractable in the absence of federal action, see *Train* v. *Natural Resources Defense Council, Inc.*, *supra*, 421 U.S. at 63–64.[59] Furthermore, municipal incinerators are

[58] The Court also pointed out that *Fry* dealt with a temporary enactment (slip op. 19). The controls involved here may also be temporary. The period for which transportation controls will be necessary will vary with the seriousness of the problem in a particular area. In some areas, they may be required only until the air quality standards are attained; in others, they may be necessary for longer periods to maintain air quality. And, of course, a State may be able to shorten the period in which controls are in effect by revising the plan in order to achieve the required air purity more quickly.

[59] The national ambient air quality standard for photochemical oxidants has been exceeded in Los Angeles on two to three hundred days per year, sometimes by a factor of seven, based on data from a monitoring network that probably gave conservative results. NAS report, *supra* n. 40, at 48. And frequent violations of the ambient standards are not confined to Los Angeles, or even to large cities; a study of small towns in Maryland, Ohio, and Pennsylvania showed that ambient air quality standards have been exceeded about fifty percent of the time. State Air Pollution Implementation Plan Progress Report, July 1 to December 31, 1975, Environmental Protection Agency 47 (April, 1976).

major sources of particulate matter. Municipal power plants emit substantial amounts of sulfur dioxide. And smog pollution arises primarily from public streets and highways due to the operation of automobiles. Accordingly, the compliance of state facilities is absolutely essential to achieve the statutory purpose of protecting the public health by a date certain.

All that remains is the objection, not specifically mentioned in *National League of Cities*, that the federal rules require affirmative state action.[60] This is not a valid constitutional objection. As the Court held in *Testa* v. *Katt*, 330 U.S. 386, 391: "[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people. * * * [T]he obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide." Indeed, the form used here—federal regulations to be promulgated only after state default—represents less of an intrusion on state sovereignty than the traditional forms of preemption (see, *e.g.*, the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1381 *et seq.*, 15 U.S.C. 1392(d); *Chrysler Corp.* v. *Tofany*, 419 F. 2d 499 (C.A. 2), or grants-in-aid (see, *e.g.*, the Federal Aid Highways Act, 23 U.S.C. 101 *et seq.*, 23 U.S.C. (Supp. V) 154 (88 Stat. 2286)). See *Pennsylvania* v. *Environmental Protection Agency*, *supra*, 500 F. 2d at 262–263.[61]

[60] Pet. No. 75–1055, App. 43a–44a; Pet. No. 75–909, App. 27a–32a.

[61] It is clear that federal regulations under the Commerce Clause can preempt traditional state functions. See, *e.g.*, *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (sewage

The activity required of the States is, in any event, minimal. A State must take three steps to comply with the federal regulations requiring an inspection and maintenance program.[62] First, although the federal regulations establish the standards that must be met and the procedures to be followed (see, *e.g.*, Pet. No. 1055, App. 62a–65a), the State must set up the program —either by contracting for its implementation by a private organization, or by delegating the responsibility to a state agency, and deciding such matters as the location of inspection stations, their hours of operation, and personnel rules.[63] Often, existing state laws will provide adequate authority for these state actions. If not, the Clean Air Act and the EPA regulations thereunder provide the authority. Nothing in the regulations requires a State to enact legislation.[64] Second,

disposal); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, and *Katzenbach* v. *McClung*, 379 U.S. 294 (regulation of motel and restaurant operations); *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, No. 75–185, decided June 25, 1976 (regulation of labor-management relations); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (control of airport noise).

[62] The steps required for implementation of the other measures would be similar but simpler; for instance, establishment of the exclusive bus lanes merely requires providing adequate markings, and then enforcing the restrictions in the same way as any other traffic controls.

[63] The State may be required to expend funds, as it frequently will when complying with federal requirements imposed pursuant to the Commerce Clause; *United States* v. *California*, *supra*; pp. 49–51, *supra*.

[64] Accordingly, no sanctions could be imposed on a State for its failure to legislate, and the Fourth Circuit's analysis (Pet. No. 75–960, App. 29a–32a) is largely irrelevant.

the State must deny registration to vehicles that fail the inspection, as they now deny registration to vehicles that fail state safety inspections (see note 52, *supra*). See, *e.g.*, Pet. No. 75–1055, App. 40a–41a. Finally, the operation of any vehicle after registration has been denied because of such non-compliance would be penalized under the applicable state registration law, see, *e.g.*, D.C. Code, Title 40, ch. 2, Sections 205 and 206 (1973 ed.).

In sum, the absence of any broad interference with state policies; the lack of any substantial impact on state budgets; the need to achieve the essential national goal of reducing air pollution; the fact that this can be done only through national action; the carefully limited intrusion into an area (pollution control) that had been left to the States; and the great deference shown to the State's choice of the methods for achieving air quality, with the EPA Administrator imposing a plan only if the State defaults—all these factors distinguish *National League of Cities* and demonstrate that the federal regulations in issue not only are valid under the Commerce Clause, but also represent national action in the great tradition of that constitutional provision.

It is no answer to say that because the States have exercised control over the use of their highways[65] they have the exclusive authority to determine whether and to what extent the resulting air pollution should be con-

[65] When the Constitution was adopted, private ownership and management of turnpikes was widespread, and local governments generally felt unequal to the task of providing public highways. Evans, *Private Turnpikes and Bridges*, 50 American Law Review 527 (1916). Cf. *Hendrick* v. *Maryland*, 235 U.S. 610.

trolled. Even if control of the highways is an "integral governmental function," control of air pollution is not. States have exercised authority over waste disposal but a State is not thereby immunized from compliance with federal air pollution controls applicable to a municipal incinerator; nor is it immunized if the incinerator is operated by a private contractor. In any event, whether a particular function is reserved exclusively to the States cannot be decided merely on the basis of how one characterizes the particular function in terms of state sovereignty. That would ignore the power of Congress to legislate in the national interest under the Commerce Clause in order to meet national problems that pay no heed to state boundaries.

We thus agree with Mr. Justice Blackmun, concurring in *National League of Cities*, that the Court's opinion in that case "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."

III.

THE COMMONWEALTH OF VIRGINIA IS NOT REQUIRED TO BREACH THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY COMPACT.

The Commonwealth of Virginia contends that EPA is requiring it to purchase buses in contravention of its duties under the Washington Metropolitan Area Transit Authority Compact, Pub. L. 89–774, 80 Stat. 1324, establishing the Washington Metropolitan Area Transit Authority (WMATA). But the Commonwealth misreads the applicable regulation and the opinion of the court below.

The regulation at issue, 40 C.F.R. 52.2435(e),[66] requires the Commonwealth and WMATA to certify to EPA that the Commonwealth or its local governments have made commitments pursuant to the terms of the Compact that are adequate, together with the commitments of the other participants in the Compact, to fund the necessary purchases. The regulation does not require the Commonwealth by itself to purchase the buses. The court below did not rewrite 40 C.F.R. 52.2435 to impose solely upon the Commonwealth the obligation to pur-

[66] 40 C.F.R. 52.2435(e) provides:

(e) With respect to the measure for increased bus fleet and service approved in § 52.2423. The Commonwealth of Virginia shall no later than January 31, 1974, submit a compliance schedule to put the program in effect. The compliance schedule shall, at a minimum, provide that the Commonwealth of Virginia shall, on or before March 1, 1974, submit to the Administrator a statement, signed both by a representative of the Commonwealth of Virginia and by a representative of the Washington Metropolitan Area Transit Authority (WMATA) indicating that, in the judgment of both of them, financial commitments have been made by the Commonwealth of Virginia or by its local governments for the purchase of buses. This statement, when taken in conjunction with the commitments made by the District of Columbia and the State of Maryland, must be sufficient to enable WMATA to purchase in the fiscal year beginning the next July 1 the number of buses indicated below:

Fiscal Year 1975—175 buses
Fiscal Year 1976—150 buses
Fiscal Year 1977—150 buses

The statement shall also indicate that WMATA has in fact committed to purchase that number of buses.

chase the necessary buses. The court merely upheld the regulation (Pet. No. 1055, App. 57a), specifically noting that it required the submission of assurances that Virginia and Maryland "or their local governments," together with the District of Columbia, have made the necessary financial commitments (*ibid.*)

The Commonwealth's current disavowal of any financial responsibility for WMATA projects (Pet. No. 75–1050, p. 12) is inconsistent with the transportation plan it submitted to EPA. That plan, like those of Maryland and the District of Columbia, contemplated the purchase of new buses as a part of a program to improve mass transit facilities. *E.g.*, 38 Fed. Reg. 33706 (December 6, 1973). The regulation to which the Commonwealth objects, therefore, does not in this respect impose any duties on the Commonwealth other than those the Commonwealth itself indicated it could perform.[67]

Finally, we submit that it is misleading to focus on the Commonwealth's responsibility for bus service in the affected area. The Commonwealth concedes that it owns and maintains its highways (Pet. No. 75–1050, p. 10). The focus should be on its responsibility to take action to reduce the air pollution that results from the motor vehicle traffic thus facilitated and encouraged.

[67] The Commonwealth's original understanding of its powers seems clearly correct. The Commonwealth participates in WMATA through the Northern Virginia Transportation District, which is authorized by Section 18 of the Compact, 80 Stat. 1332, to make commitments for the acquisition of transit facilities. The District's enabling legislation (Code of Va., Title 15.1, Ch. 32. § 15.1–1358(e); Ch. 631, Va. Acts of Assembly, 1964) permits it to accept state grants for such purposes.

Providing additional buses (or sharing in the cost of their acquisition) is simply one measure by which this kind of air pollution can be reduced. The Commonwealth's responsibility to take such actions flows from its ownership of the highways and is not diminished by the particular arrangements it has made for provision of bus service.

CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals for the ninth and fourth circuits should be reversed, and the judgment of the court of appeals for the District of Columbia circuit should be reversed insofar as it prohibits the Administrator from requiring a State to implement necessary transportation control measures, and affirmed in all other respects.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

EDMUND B. CLARK,
BRUCE J. CHASAN,
NEIL T. PROTO,
MICHAEL D. GRAVES,
Attorneys.

G. WILLIAM FRICK,
General Counsel,

JOHN E. BONINE,
Associate General Counsel,

GERALD K. GLEASON,
Deputy Associate General Counsel,
Environmental Protection Agency.

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APPENDIX

Constitutional Provisions and Statutes Involved:

I. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

II. Sections 101, 107, 109, 110, 113 and 302 of the Clean Air Act of 1967, 81 Stat. 485, as amended by the Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857 *et seq.*, as amended by Section 302, 85 Stat. 464 and

Sections 4 and 6 of the Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93–319, 88 Stat. 256 (42 U.S.C. (Supp. V)), provide in relevant part:

Section 101 (42 U.S.C. 1857)

FINDINGS AND PURPOSES

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States:

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health

and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Section 107 (42 U.S.C. 1857c–2)

AIR QUALITY CONTROL REGIONS

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * * *

Section 109 (42 U.S.C. 1857c–4)

NATIONAL AMBIENT AIR QUALITY STANDARDS

(a)(1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary

ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b)(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based

on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Section 110 (42 U.S.C. (and Supp. V) 1857c–5)

IMPLEMENTATION PLANS

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under

paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to

insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially

inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans [*sic*] and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate

authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed eighteen months from the date otherwise required for submission of such plan.

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) The State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required

pursuant to a provision of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) which the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirement before such date.

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2)(A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307(a) (relating to subpoenas) shall be applicable to any proceeding under this subsection.

Section 113 (42 U.S.C. (and Supp. V) 1857c–8)

FEDERAL ENFORCEMENT

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any per-

son is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of Federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b).

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 111(e) (relating to new source performance standards), 112(c) (relating to standards for hazardous emissions), or 119(g) (relating to energy-related authorities), or is in violation of any requirement of section 114 (relating to inspections,

etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b).

(4) An order issued under this subsection (other than an order relating to a violation of section 112) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a); or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of a finding that such person is violating such requirement; or

(3) violates section 111(e), 112(c), or 119(g); or

(4) fails or refuses to comply with any requirement of section 114.

Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

(C) violates section 111(e), section 112(c), or section 119(g)

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed

or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

Section 302 (42 U.S.C. 1857h)

DEFINITIONS

When used in this Act—

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

* * * * *

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

* * * * *

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

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